Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC.; AMERICAN BROADCASTING COMPANIES, INC.; NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER CBS INC.

I. RESPONDENTS HAVE FAILED TO REFUTE CBS' SHOWING THAT CONGRESS IN ENACTING SECTION 312(a)(7) INTENDED TO CODIFY THE COMMISSION'S PREEXISTING PRACTICE UNDER THE PUBLIC INTEREST STANDARD.

1. Despite the Federal Communications Commission's conclusion in its orders under review that the language of Section 312(a)(7), 47 U.S.C. § 312(a)(7), provides little guidance to its interpretation,[1] respondents now maintain (FCC Br. 19, 23, 40) that the "plain meaning" of the section is so clear that resort to the legisiative

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[1] Appendix B to Petitions for Certiorari ("Pet. App.") at 78a, 74 F.C.C.2d 631, 637 (1979). The statement required by Rule 28.1 of the Rules of this Court appears in Brief for Petitioner CBS Inc. ("CBS Br.") at ii, n.*.

history is unnecessary and perhaps inappropriate.[2] Significantly, the brief of *amici curiae* National Citizens Committee For Broadcasting, *et al.*, while taking a view of the constitutional issues similar to that of respondents, recognizes that the meaning of the statute is "not without ambiguity." (NCCB Br. 11 n.15.)

Section 312 (a) (7) provides only that the Commission may "revoke any station license" for

> "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a) (7).

In respondents' view (FCC Br. 20), the reference to the use of broadcast facilities by "a" candidate "on behalf of his candidacy" unequivocally expresses a congressional intent to impose obligations on broadcasters wholly different from those imposed by the Commission's pre-existing policy under the public interest standard.

The question, however, is not whether individual candidates have a "right" to invoke Commission processes in order to challenge broadcaster practices they think inconsistent with statutory requirements or Commission policies. Candidates had such a "right" before Section 312 (a) (7) was enacted, and often exercised it.[3] Rather, the issue is whether Section 312(a) (7) imposes a new substantive obligation. But that provision, like the other provisions of Section 312(a) (*see* CBS Br. 27-28), does

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[2] Even if the statutory language were as "plain" as respondents contend, there is no rule of law that reference to the statutory context and legislative history is inappropriate. *E.g.*, *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

[3] *See, e.g.*, *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782, 783 (1971), *Lew Breyer*, 31 F.C.C. 2d 548 (1968); *W. Roy Smith*, 18 F.C.C. 2d 747 (Broadcast Bur. 1969); *Grover C. Doggette*, 40 F.C.C. 346 (1962); *WROX*, 40 F.C.C. 339 (1962).

not purport to impose *any* obligation.[4] It only authorizes the Commission to revoke licenses for "willful or repeated failure" to meet a standard of "reasonableness" in affording access to a candidate. Prior to the enactment of Section 312(a)(7), the Commission had applied a standard of reasonableness under the public interest standard,[5] and the language of the statute does not purport to establish a different standard of reasonableness under Section 312(a)(7).

2. As shown in our opening brief (CBS Br. 14-34), the whole background and history of Section 312(a)(7) confirms this Court's conclusion that the section "essentially codified" the Commission's prior practice under the public interest standard. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94, 113-14 n.12 (1973).[6] Respondents virtually ignore the strong policy of the Communications Act

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[4] The section is thus in sharp contrast to Section 315 of the Act, 47 U.S.C. § 315, which provides that a licensee "*shall* afford equal opportunities" to competing candidates if it permits the use of its station by one candidate. (Emphasis supplied.) Significantly, prior to the passage of Section 312(a)(7), Congress rejected legislative proposals that would have appended an access provision to Section 315, either in the form of a mandatory duty, *see* 116 CONG. REC. 11593 (1970), or a grant of broad rulemaking authority to the Commission. S. 956, § 302(c), 92d Cong., 1st Sess. (1971).

[5] *See Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, 40 F.C.C. 1088, 1095 (1963).

[6] The contorted efforts of respondents (FCC Br. 37-40) and *amici* (NCCB Br. 14-15) to rewrite this Court's opinion in *CBS* v. *DNC* call for little response. There is no basis for respondents' reading of this Court's opinion as somehow *contrasting* "the special treatment afforded 'political candidates' under the Communications Act with the treatment afforded 'any private individual or group.'" (FCC Br. 39.) The Court's statement clearly was offered in support of its conclusion—which was central to the holding in *CBS* v. *DNC*—that despite frequent amendments of the Communications Act, Congress had never created individual, affirmative rights of access. *See* CBS Br. 19-20.

against affirmative access rights, and do not even discuss this Court's recent decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), which is central to this case.[7] In *Midwest Video*, this Court made clear that Commission regulations imposing common carrier access requirements are fundamentally inconsistent with the policies of the Communications Act, stressing "Congress' stern disapproval" of access requirements which negate "the editorial discretion otherwise enjoyed by broadcasters and cable operators alike." *Id.* at 708; *see also id.* at 702-06; *CBS* v. *DNC*, 412 U.S. at 103-14.

Respondents make the remarkable suggestion that Section 312(a)(7) is not inconsistent with these longstanding policies, because of "Congress' different treatment of general broadcasting and political broadcasting." FCC Br. 25.) They also assert that Section 312(a)(7) is nothing more than a "limited extension" of the equal opportunities requirement of Section 315(a). (FCC Br. 26.) In making this argument, respondents gloss over the critical distinction between the contingent rights of access granted by Section 315, which arise only after and in response to a broadcaster's editorial decision to allocate time to one or more candidates, and the affirmative right to compel the allocation of time that the Commission has found in Section 312(a)(7).[8] Congress was unwilling to convey any such affirmative right to candidates in Section 315, and, as this Court recognized in *Midwest Video*, *supra*, Congress withheld from the Commission power "to compel broadcasters to act as common carriers, *even with respect to a portion of their total services.*" 440 U.S. at 706 n.15 (emphasis added).

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[7] Respondents casually assert in a footnote to their constitutional argument (FCC Br. 65 n.55) that *Midwest Video* "has no bearing on the question presented here."

[8] The reply obligations upheld in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) were likewise contingent on prior broadcaster editorial decisions. *See id.* at 392; pages 15-16 *infra*.

To be sure, the Commission before the enactment of Section 312(a)(7) had adopted a policy under the public interest standard requiring broadcasters to afford some time to candidates, but that policy did not impose "common carrier" obligations. It did not delegate to individual candidates the right to demand access according to their individual needs, but instead allowed the broadcaster considerable latitude in determining when and under what circumstances political time should be sold. *See Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, 40 F.C.C. 1088, 1095 (1963).

3. As we have demonstrated (CBS Br. 14-34), the particular legislative history of Section 312(a)(7) makes clear that Congress did not intend to alter the Commission's existing standard.

a. Respondents do not dispute the existence of the Commission's prior practice, or deny that Congress was aware of it. Indeed, they concede (FCC Br. 31 & n.21) that Congress specifically discussed the Commission's prior practice when it enacted Section 312(a)(7). However, respondents erroneously contend that Section 312(a)(7) resulted from congressional demands "for increased media access for political candidates" (FCC Br. 27), implicitly urging that Congress was dissatisfied with the existing standards for paid political access under the public interest standard. As we have shown (CBS Br. 22-24), the Commission frequently informed congressional committees dealing with political broadcasting matters of its policies concerning the sale of political time, and there is no indication that Congress viewed the Commission standards as inadequate.[9]

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[9] Respondents point to only one statement, by Senator Pastore in hearings held over ten years before the consideration of Section 312(a)(7), that suggests any congressional dissatisfaction with broadcaster policies with regard to paid political broadcasting. FCC Br. 27, *citing Presidential Campaign Broadcasting Act: Hearings Before the Communications Subcomm. of the Senate Comm. on*

Moreover, in the period before the enactment of Section 312(a)(7), there were no proposals to alter the existing Commission standards concerning the sale of time at commercial rates. Respondents' citations (FCC Br. 27-28) refer only to various bills (never enacted) directed at reducing campaign costs by mandating the provision of *free* time by broadcasters to candidates[10] or the provision of time at discount rates.[11]

Interstate and Foreign Commerce, 86th Cong., 2d Sess. 59-60 (1960). Senator Pastore referred to an alleged refusal by one Texas station to sell time to any candidates. *Id.* at 59. Immediately following Senator Pastore's remarks, Chairman Ford of the Commission informed the senator that broadcasters who denied any time to political broadcasts would violate their obligations under the public interest standard. *Id.* at 60. In subsequent years, Senator Pastore expressly indicated his satisfaction with the Commission's existing policy, *see Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess. 100-01, 144 (1962) (*"1962 Senate Hearings"*), and recommended its codification in the Communications Act. 116 CONG. REC. 11593-94 (1970).

Respondents also suggest that Congress was concerned with "the Commission's inability to protect individual candidates" (FCC Br. 27), citing a remark by Chairman Minow in hearings before the Senate Commerce Committee. *1962 Senate Hearings, supra*, at 142. Chairman Minow's testimony reflected the Commission's concern that it could enforce its public interest policy only in license renewal proceedings and is entirely consistent with a view of the statute as only creating a new sanction (*i.e.*, revocation) for violations of existing policy. *See* page 7 *infra*.

[10] S. 3171, 86th Cong., 2d Sess. (1960); S. 1548, 90th Cong., 1st Sess. (1967).

[11] S. 2876, 91st Cong., 1st Sess. (1969). Respondents also rely (FCC Br. 28) on the one provision considered by Congress prior to 1971 that did concern the sale of political time at commercial rates, the 1970 Senate amendment to S. 3637, 91st Cong., 2d Sess. (1970), that would have required broadcasters to "make a reasonable amount of time available" to candidates for federal office. *See* 116 CONG. REC. 11593 (1970). However, respondents fail to recognize that this provision, which was clearly the antecedent of Section 312(a)(7) (*see* CBS Br. 24-25), was designed to codify the public interest standard in order "to avoid any misunderstanding as to the obligation of the licensee in making time available to candi-

b. Respondents do not discuss the legislative history which suggests that Congress sought to achieve three distinct purposes in codifying the Commission's public interest standard in Section 312(a)(7). First, Congress sought to remove any question whether the Commission's requirement that broadcasters provide some time to political candidates was barred by the provision of Section 315(a) that "[n]o obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." [12] Second, Section 312(a)(7) was intended to eliminate concern that the Commission lacked adequate authority to enforce its public interest standard,[13] by creating a remedy of license revocation for "willful or repeated" violations. Third, Congress sought to ensure that the enactment of other provisions of the Federal Election Campaign Act of 1971, particularly the lowest unit rate and media expenditure limitations, would result in "no diminution in the extent" to which broadcasters made available time to candidates. S. REP. No. 96, 92d Cong., 1st Sess. 28 (1971).

c. Respondents concede (FCC Br. 30-31) that the most relevant portion of the legislative history, the specific discussion of Section 312(a)(7) contained in the report of the Senate Commerce Committee, explicitly refers to the Commission's prior policy. There is not a shred of support in the Senate report for respondents' theory that the specific discussion of the prior policy was included in order to "distinguish" it from the new right assertedly created by Section 312(a)(7),[14] and

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dates for a Federal elective office." 116 CONG. REC. 11593 (remarks of Sen. Pastore).

[12] *See Political Broadcasts—Equal Time: Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 70-82 (1963).

[13] *See 1962 Senate Hearings, supra* note 9, at 142-43 (remarks of Sens. McGee and Pastore), 152 (FCC Memorandum).

[14] Neither the Commission nor the court of appeals adopted this view. The Commission asserted that this history "adds little," Pet. App. B at 79a, 74 F.C.C.2d at 637, and the court claimed that the

that theory is plainly inconsistent with the language of the report:

> —The Senate Committee described the provisions of Section 312(a)(7), and then stated that "[t]he duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the [community] of license." S. REP. No. 96, *supra*, at 34.
>
> —The Senate Committee, adopting language used earlier by a House Committee to describe the public interest standard,[15] noted that "[t]he presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest." It stressed that the Commission should "continue to consider" licensee performance under that standard. *Id.* at 28.
>
> —The Senate Committee stated that it had included an "express provision to this effect"—Section 312(a)(7)—"[i]n order to emphasize the public interest obligation inherent in making broadcast time available to candidates." *Id.*

Respondents' claim (FCC Br. 31 n.21) that in stating that the Commission should "continue to consider" compliance with the public interest standard, Congress intended merely to suggest that the existing standard would continue to be applied in *renewal* proceedings, but that a new standard would apply in *revocation* proceedings. The notion that a broadcaster's exposure should be greater in revocation proceedings in which the burden is on the Commission, 47 U.S.C. § 312(d), than in a renewal proceeding, is absurd. It is also inconsistent with

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passage was of little utility because "there is no specific explanation of the statutory language or statement of its intended impact." Pet. App. A at 17a, n.32, 629 F.2d at 12 n.32. The Court nonetheless found that the statute had drastically altered the Commission's preexisting policy. *Id.* at 14a, 629 F.2d at 11.

[15] *See* CBS Br. 25-26, *quoting* H.R. REP. No. 1347, 91st Cong., 2d Sess. 7 (1970).

respondents' view (FCC Br. 20-21 n.9) that the Commission possesses broad authority to apply the standards of Section 312(a)(7) in proceedings other than revocation.

d. Respondents' legislative history argument rests, at bottom, solely on the smidgen of legislative history suggesting that a purpose of Title I of the Federal Election Campaign Act of 1971 was to "give candidates for public office greater access to the media."[16] Contrary to respondents' suggestion (FCC Br. 30), the correlation between this purpose and Section 312(a)(7) is neither "obvious" nor "compelling." The Senate report carefully enumerated the provisions it viewed as directed at the purposes of Title I, and omitted Section 312(a)(7). That omission is entirely consistent with the stated purpose of Section 312(a)(7)—to assure that "no diminution" of political broadcasting would result from the enactment of other provisions of Title I.[17]

e. The legislative history also illuminates the significance of the limitation of Section 312(a)(7) to federal candidates. Contrary to respondents' argument (FCC Br. 23) that the limitation must reflect an intent to create an expanded right for federal candidates, the Senate report shows that Section 312(a)(7) was included to "emphasize" the public interest obligation with respect to "candidates covered by the spending limitation in the legislation"—*i.e.*, federal candidates. S. REP. NO. 96, *supra*, at 28.[18]

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[16] *See* FCC Br. 29-30, *quoting* S. REP. NO. 96, *supra*, at 20.

[17] S. REP. NO. 96, *supra*, at 28. Respondents also rely (FCC Br. 28) on remarks of Senator Pastore in earlier hearings as indicating a desire to afford "greater access." But Senator Pastore's reference to "increas[ing] a candidate's accessibility to the media," *Federal Election Campaign Act of 1971: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 2 (1971), referred to other provisions of the bills introduced in 1971 and not to those concerning the provision of *paid* time at commercial rates to candidates.

[18] Even at this point in the legislative history, it was intended that the section be limited to federal candidates. S. REP. NO. 96, *supra*, at 34, 38.

f. Finally, respondents seek to minimize the significant underlying purposes of the FECA—shortening campaigns and making them less costly (*see* CBS Br. 31)—that would be severely contradicted by the Commission's interpretation of Section 312(a)(7). While, as respondents recognize (FCC Br. 40 n.30), Congress adopted other provisions directed at the goals of shortening compaigns and reducing their costs, this Court should not interpret Section 312(a)(7) in a manner that undercuts the achievement of those goals.

4. Respondents argue (FCC Br. 32-37) that, apart from the contemporaneous history of Section 312(a)(7), subsequent history shows that Congress approved the Commission's present interpretation. As this Court has recently emphasized, subsequent history normally has little value in discerning congressional intent.[19] But to the extent that such history has value, it leads to the opposite conclusion.

In a policy statement issued shortly after Section 312(a)(7) became law in 1972, the Commission described its approach under the public interest standard and emphasized that under Section 312(a)(7), it would "apply the *same test of reasonableness* of the judgment of the licensee."[20] Nothing in the 1972 policy statement suggests that the Commission believed that the section was intended to provide "greater access."[21] In 1973 testimony

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[19] *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. 2051, 2060-61 & n.13 (1980); CBS Br. 33-34 n.29.

[20] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C. 2d 510, 538 (1972) (emphasis supplied). Respondents do not even mention this critical statement, but instead rely (FCC Br. 33-35 & n.23) on a reference in the 1972 policy statement to Section 312(a)(7) as creating an "additional specific requirement" for federal candidates. *See* 34 F.C.C.2d at 538. This reference is not inconsistent with the view that the "same test of reasonableness" would apply.

[21] Thus, contrary to respondents' contention (FCC Br. 33), the Commission has not "consistently construed" the statute to create an enlarged individual right of access. In light of the Commis-

before the Communications Subcommittee and in a subsequent letter, Chairman Burch of the Commission cited the 1972 policy statement, and stressed that broadcasters retained wide discretion in responding to access requests by candidates;[22] it was on this basis that the Committee rejected arguments by broadcasters that the statute should be repealed. S. REP. No. 170, 93d Cong., 1st Sess. 6-7 (1973). *See* CBS Br. 32-33 & n.79.

5. Nothing in the other subsequent legislative history cited by respondents (FCC Br. 34-37) shows that Congress has approved or acquiesced in the interpretation of Section 312(a)(7) now advanced by the Commission. The various cited hearings (FCC Br. 35-36 n.27) were concerned almost exclusively with proposals to repeal the fairness doctrine and the equal time requirements with respect to presidential and vice-presidential races, and respondents point to no statement by a member of Congress that in any way suggests an endorsement of the Commission's present interpretation of Section 312(a)(7).[23] Respondents also rely (FCC Br.

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sion's shifting view of the statute's requirements (*see* CBS Br. 33 n.78), its current pronouncements are entitled to little weight. *E.g.*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976).

[22] *Federal Election Campaign Act of 1973: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 137 (1973) (*"1973 Senate Hearings"*); S. REP. No. 170, 93d Cong., 1st Sess. 7-8 (1973). Nothing in the remarks of Senator Pastore quoted extensively by respondents (FCC Br. 35, *quoting 1973 Senate Hearings, supra*, at 137) suggests that he understood Section 312(a)(7) to create an enlarged right of access for federal candidates.

[23] *Cf. TVA* v. *Hill*, 437 U.S. 153, 191-93 (1978); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978). Respondents rely (FCC Br. 36 n.25) on congressional hearings following the Commission's decision in this case, but all those hearings show is that the general counsel of the Commission told the Committee that the issue in this case was before the courts. *Repeal of "Equal Time" Requirements: Hearing Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 42 (1980). A remark by subcommittee counsel, *id.* at 43, is obviously of little value in discerning congressional intent.

36-37 n.26) on the failure of Congress to enact certain bills that would have repealed Section 312(a)(7).[24] These bills, none of which emerged from committee, were not directed at overruling the Commission's interpretation of Section 312(a)(7), but merely included repeal of Section 312(a)(7) as part of comprehensive legislation that would have eliminated or restricted Commission authority to engage in regulation of broadcast programming generally.[25]

II. RESPONDENTS HAVE FAILED TO ESTABLISH THAT THE COMMISSION'S CONSTRUCTION OF SECTION 312(a)(7) DOES NOT INTRUDE INTO THE BROADCASTER DISCRETION THAT CONGRESS INTENDED TO PRESERVE.

1. Even if Section 312(a)(7) did not codify the Commission's prior practice under the public interest standard, Congress nonetheless intended to preserve substantial latitude for broadcaster judgment as to the nature and amount of time to be made available to federal candidates. We have urged (CBS Br. 34-35) that use of a standard of "reasonableness" necessarily invites reference to the Commission's fairness doctrine, which has consistently been interpreted to afford broadcasters a "wide degree of licensee discretion."[26] and that, at a minimum, Congress intended to preserve the same latitude under Section 312(a)(7). Respondents do not even address this argument, save for an oblique reference in one footnote. (FCC Br. 48 n.38.) Indeed, respondents' brief confirms

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[24] S. 1178, § 2, 94th Cong., 1st Sess. (1975); S. 22, § 3, 95th Cong., 1st Sess. (1977).

[25] Failure to enact such bills would have little significance even if they were designed to overrule the interpretation adopted by the Commission. *Zuber* v. *Allen*, 396 U.S. 168, 185-86 n.21 (1969); *Girouard* v. *United States*, 328 U.S. 61, 69-70 (1946).

[26] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 n.14 (1979).

that, under the Commission's interpretation of Section 312(a)(7), broadcasters have virtually no discretion.

2. Respondents' brief (FCC Br. 46-49) confirms that, under the Commission's decision, the question of when the sale of time to candidates should begin is no longer an editorial decision for the broadcaster. Respondents defend the Commission's assumption of the authority to decide these issues on the ground that "the Commission's determination serves to *narrow* the statute's coverage." (FCC Br. 47.) This argument is specious. Prior to this case, it was clear that broadcasters were entitled to make an editorial judgment that it was too early to sell the requested time.[27] The Commission has not narrowed its role in this area, but has arrogated to itself the sole power to decide this question.[28]

3. Respondents make clear that, under the Commission's approach, "the candidate—and not the broadcaster—[is] the ultimate judge" (FCC Br. 24) of what political programming shall be presented to the viewing public, and that the broadcaster must defer to the needs of the individual candidate. Respondents bluntly reject CBS' contention that broadcasters are entitled to adopt political broadcasting policies designed to treat all candidates in an even-handed manner, urging must defer to the needs of the individual candidate and that a policy of evenhandedness somehow promotes discrimination among candidates (FCC Br. 51). In fact, any danger of favoritism among candidates is clearly greater under a system that requires individualized con-

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[27] As we have noted (CBS Br. 39-40), in earlier cases the mission viewed the question of when the sale of time should begin as within the broadcaster's discretion. *See also, e.g., Anthony R. Martin-Trigona*, 67 F.C.C.2d 743, 746 n.4 (1978).

[28] Indeed, by assuming as well the power to decide that a campaign has *not* begun, the Commission's decision increases the danger of discriminatory treatment by allowing the Commission unilaterally to deny time to a disfavored candidate.

sideration of each candidate's needs. *See* CBS Br. 37. In making this argument, respondents inappropriately downplay the fundamental political broadcasting policy of Section 315, embodied in the Communications Act since the beginning, of promoting equal treatment among candidates (FCC Br. 50-51).

4. Respondents' brief also confirms that the Commission has claimed the power to determine itself the weight that may be given to such countervailing factors as the likelihood of multiple candidate requests. Respondents do not dispute that there are frequently multiple candidates in an election who might request time. Rather, they simply deny that broadcasters have the right to make predictive judgments regarding the likelihood of requests from those candidates.[29] Editorial judgments, however, must necessarily take into account factors and risks that cannot be demonstrated to a certainty.[30] To insist on proof to the Commission's satisfaction is to shift control of those judgments from the broadcaster to the Commission. Moreover, according to respondents, the likely requests that could be considered here are limited to "requests for *equal time*" (FCC Br. 53 (emphasis supplied)) by candidates for the Democratic nomination (FCC Br. 53 n.43). They could not include requests under Section 312(a)(7) by *Republican* candidates, such as those that CBS had already received from candidates for the Republican nomination prior to the Carter Committee's request for time in October 1979. J. A. 77-79. There is no rational basis for limiting consideration to equal time requests under Section 315 and excluding possible requests under Section 312(a)(7).

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[29] As we have pointed out (CBS Br. 38), the option of contacting candidates in advance (*see* FCC Br. 50, 54 n.43) would not meaningfully increase broadcasters' abilities to predict candidate demands over the course of the campaign.

[30] Respondents attempt to rely (FCC Br. 54 n.43) on subsequent events in denigrating the networks' concerns as to multiple candidate requests. However, the reasonableness of a broadcaster's judgment obviously cannot be measured by hindsight.

III. RESPONDENTS HAVE FAILED TO ANSWER CBS' SHOWING THAT SECTION 312(a)(7), AS CONSTRUED BY THE COMMISSION, VIOLATES THE FIRST AMENDMENT.

1. In addressing the constitutional issue raised by this case, respondents assert that the system of access for individual federal candidates created by the Commission under Section 312(a)(7) represents "only a re-allocat[ion] [of] the 'use' of portions of the airways" (FCC Br. 64, *quoting* Pet. App. A at 47a, 629 F.2d at 25), and make the extraordinary suggestion that "with respect to airtime that Congress has reallocated for political use, broadcasters possess no editorial discretion." (FCC Brief 64 n.54.) While Congress might conceivably have adopted a different approach to broadcasting regulation that reserved particular channels or even time periods to specific uses, Congress chose instead to adopt a system that placed in the broadcaster maximum editorial responsibility. *See CBS* v. *DNC*, 412 U.S. at 103-14. As we have shown (CBS Br. 42-44), the system of Commission oversight of broadcaster programming choices involved here cannot in any meaningful sense be considered a "re-allocation" of the spectrum.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969), on which respondents (FCC Br. 63) and *amici* (NCCB Br. 8-9) principally rely, does not establish an unchecked power on the part of the government to negate the editorial choices of broadcasters whom it has charged with performing an editorial function. In *Red Lion*, this Court confirmed Congress' fundamental policy choice that the public's interest in access to ideas would best be served by a system of public trusteeship, in which broadcasters may reasonably determine what should be broadcast in the public interest. This Court upheld the right of reply requirement embodied in the Commission's personal attack rules, a contingent right that is triggered only by an initial editorial decision by the broadcaster and under which a large measure of broadcaster dis-

cretion is thereby preserved.[31] In *CBS* v. *DNC*, this Court reaffirmed the crucial distinction between affirmative rights of access and the right of reply that was upheld in *Red Lion*. 412 U.S. at 126-27.

2. We have urged (CBS Br. 45-47) that the affirmative access system created by the Commission in this case poses significant dangers of government involvement in a "continuing case-by-case determination of who should be heard and when," *CBS* v. *DNC*, 412 U.S. at 127. Respondents seek to minimize these dangers by asserting that Section 312(a)(7), as construed by the Commission, "is largely self-executing." (FCC Br. 66, 68.) To the contrary, the affirmative right of access created by the Commission under Section 312(a)(7) invites frequent application to the agency by dissatisfied candidates and requires frequent subjective determinations by the Commission concerning whether the campaign has commenced, whether the candidate "needs" the requested time, whether the broadcaster's offer is to be deemed "responsive" (*see* FCC Br. 52), and whether "countervailing factors" outweigh candidate needs. Thus, Section 312(a)(7) can in no way be considered "self-executing" or mechanical.

3. Respondents fail to comprehend that the dangers of this access scheme are particularly acute because of the inherent political sensitivity of the determinations the Commission is called upon to make. Remarkably, they make no attempt to address the significant risks of non-neutral decisionmaking, dangers that so troubled Judge Tamm, *see* Pet. App. A at 59a-64a, 629 F.2d at 30-33, and that are inevitable when the beneficiaries of the right of access—federal candidates, especially incumbents—are in a position to influence Commission decisionmaking. These dangers are highlighted

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[31] The Court also upheld the Commission's fairness doctrine, which generally imposes on broadcasters an obligation to provide coverage of controversial issues and to devote time to opposing views. *See* 395 U.S. at 394. Neither of those obligations confers a right of access on any person or group or involves the kind of substitution of broadcaster judgment entailed by Section 312(a)(7).

when the Commission applies a standard that explicitly requires it to pass judgment on the validity of individual candidates' asserted needs.[32]

4. While purporting to recognize that candidates, like all other persons, have no First Amendment right "to demand access to television or radio," (FCC Br. 58 n.49),[33] respondents attempt to justify Commission instrusion into broadcaster editorial judgments on the ground that the "purposes of the First Amendment" are served by granting access to candidates. (FCC Br. 59 n.50.) In *CBS* v. *DNC*, the identical argument was made that even if there was no First Amendment right of access to the broadcast media, potential speakers had a First Amendment "interest" in such access, and that the statute should be construed to afford rights of access. This Court, in finding no such First Amendment interest in providing access, squarely rejected the notion that "every potential speaker is 'the best judge' of what the listening public ought to hear." 412 U.S. at 124.

Contrary to respondents' argument (FCC Br. 58-59), nothing in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), supports the view that Congress may restrict the First Amendment rights of others in order to enhance politicians' ability to present their message to the public. This Court's statement in *Buckley* that a candidate may "vigorously and tirelessly advocate his own election," *id.* at 52-53, was made in the context of this Court's holding that limitations on expenditures by a candidate of his

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[32] The dangers are hardly minimized, as *amici* appear to suppose (NCCB Br. 23), by the Communications Act's prohibition against more than four members of the Commission being members of the same party. It is noteworthy that, in the present case, it was the four Democratic Commissioners who made up the bare majority in favor of President Carter's complaint.

[33] *Amici*'s position, on the other hand, appears to proceed from the erroneous view that political candidates do have a First Amendment right to access to present their views. (*See* NCCB Br. 10, 19 (n.42.)

personal funds violated the First Amendment. The Court emphasized in *Buckley* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48. *See also Consolidated Edison Co.* v. *Public Service Commission*, 100 S. Ct. 2326 (1980); *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978).

5. Respondents' invocation of the interests of federal candidates in presenting their views to the public only highlights the substantial concerns of discrimination raised by the Commission's interpretation of Section 312 (a) (7), concerns to which respondents pay scant attention. Thus, the access system at issue here explicitly discriminates in favor of one class of speakers, federal candidates, despite this Court's recognition in *CBS* v. *DNC* that there exists "no principled means" under the First Amendment to justify according preferential access rights to particular classes of speakers on controversial issues. 412 U.S. at 127 n.21. Moreover, as we have noted (CBS Br. 45), the system also favors wealthy candidates over those who lack funds, and is therefore at odds with the goals of the First Amendment. *See CBS* v. *DNC*, 412 U.S. at 123[34]

6. Nor is the construction of Section 312(a) (7) adopted by the Commission necessary to satisfy the interests of viewers in being informed about political matters. Neither respondents nor *amici* suggest any reason why the public interest standard, which is consistent with the principles laid down by this Court in *Red Lion*, is insufficient to meet the interests of viewers, and we believe the record shows a high degree of awareness on the part of CBS and other broadcasters of their continuing obligations in this respect. At a minimum, the

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[34] Respondents assert only that "[t]he expenditure of funds to promote one's candidacy is itself an aspect of protected free speech" (FCC Br. 59 n.51). Again, this hardly suggests the necessity or appropriateness of government action to favor wealthy candidates.

severe constitutional problems raised by the Commission's construction of Section 312(a)(7) should lead this Court to continue to construe the provision as doing no more than codifying this existing public interest standard.

7. Finally, respondents make no effort to meet our argument (CBS Br. 47-48) that the Commission has failed to adopt clearly defined standards in this First Amendment area or procedures to ensure "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" decision. *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965). Respondents assert only that it is "unnecessary to speculate" about such matters (FCC Br. 69). They apparently believe that broadcasters should not be concerned about the infirmities of this access system because "the Commission has not imposed sanctions of any kind on any broadcaster." (FCC Br. 68.) Such sanguine assurances stand in stark contrast to the Commission's position at the time of its orders in this case. Then the Commission refused to grant a stay pending judicial review and warned of "specific measures" to correct any "further failure to meet obligations which have been substantially and clearly defined." Pet. App. C at 142a, 74 F.C.C.2d at 676. The Commission specifically stated that it might impose sanctions on a licensee that initially rejected a request and failed to convince the Commission of the reasonableness of its position.[35]

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[35] *See* Respondents' Memorandum on Question of Mootness, in Nos. 79-2403, etc. at 3-4 (D.C. Cir. Dec. 19, 1979).

CONCLUSION

For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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